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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICARDO RAMIREZ MERENTES,

Defendant and Appellant.

G030916

(Super. Ct. No. 00NF3013)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Daniel J. Didier, Judge. Affirmed as modified.

Ronda G. Norris, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Pamela A. Ratner Sobeck and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

Ricardo Ramirez Merentes was convicted of assaulting, sexually molesting and murdering his girlfriend's five-year-old-daughter Jimena. He seeks reversal on the grounds his admissions to the police were involuntarily rendered, the trial court excluded exculpatory evidence, and the jury was not properly instructed. Other than to correct a couple of clerical errors, we affirm the judgment.

* * *

In the spring of 2000, Merentes moved into a Placentia apartment with his girlfriend Claudia Correal and her two daughters, Jimena and newly-born Sabrina. Not long thereafter, Jimena began to complain about being abused. She told her father Raul Orozco that Merentes sometimes put his hand over her mouth so she could not breathe and that other times he grabbed her by the neck and threw her on the bed. Jimena further alleged that Merentes "would put his finger in her private part." She also told Orozco that Correal hit her sometimes.

An investigation ensued, and in August Jimena told a social worker that Correal slapped her often and once hit her in the head with a remote control device. She accused Merentes of striking her with a sandal and a belt. In addition, she said Merentes "put his finger in one of her holes, and that it hurt." Jimena made similar statements to her cousin, telling her that Merentes physically and sexually abused her.

By the fall, Merentes, Correal and the children had moved to Santa Ana, where they rented a room from Myrna Amezcua. On the evening of November 15th, Amezcua saw Merentes tending to Jimena while Correal was at work. Merentes said he was going to give Jimena a bath because she was sweating. Amezcua thought this odd because it was rather cold that evening.

The following morning, Jimena vomited several times and complained of stomach pain. Despite this, Merentes brought her along when he drove Correal to work that afternoon. On the way home, Jimena vomited again and became very pale and quiet. Merentes pulled over at a grocery store to seek help, but by the time the paramedics

arrived Jimena was already unconscious. Upon being taken to the hospital, she was pronounced dead on arrival.

Jimena died from acute fecal peritonitis, brought on by ruptures in her small intestine and pancreas. The medical examiner believed the ruptures were caused by blunt injury to Jimena's abdomen, which was laced with circular contusions and bruises. Jimena also had fractured ribs and contusions and bruises on her chest, chin, pelvis, legs, neck and arm. The wounds were of varying ages, although most of them, including the fatal abdominal wounds, were inflicted within 18 to 48 hours of Jimena's death. In addition to these injuries, Jimena's hymen and the lower portion of her vagina were lacerated, indicating she had been sexually abused.

After Jimena was taken to the hospital, the police contacted Merentes at the scene and he agreed to come in for questioning. During the interview, Merentes gave several explanations as to how Jimena sustained her fatal abdominal wounds. First, he said she fell out of her bed during the night and landed on a vase. Then he said she accidentally fell into his knees while they were playing together the previous day. After that, he changed his story again and said she fell into his hand. Eventually, he admitted he hit Jimena out of anger. He said he punched her in the stomach because he did not like the way she was playing with her baby sister Sabrina.

At trial, Merentes reverted to his claim that Jimena injured herself by falling on a vase. He admitted getting angry at Jimena for being rough with Sabrina, but he insisted that when this happened, he simply grabbed Jimena and took her out of the room. While conceding he may have accidentally poked Jimena in the stomach at this time, he denied punching her or handling her in a violent manner. Asked why he told the police he had punched Jimena, Merentes said it was because they wouldn't leave him alone and he felt pressured by them. He also claimed that he used the words "punch" and "pull" interchangeably during the interview and that when he said he had punched Jimena he really meant that he had just pulled her. At another point in his testimony, however,

Merentes contradicted himself on this issue and admitted he used the word “punch” to describe his actions because that was the best way to explain what he actually did to Jimena.

A defense expert on police interrogations testified psychological pressures brought about by police questioning can lead a suspect to make false admissions. However, he declined to offer an opinion as to whether Merentes’ admissions to the police were actually untrue.

In closing argument, defense counsel asserted Merentes’ admissions were, in fact, untrue and that Correal was the person who was most likely to have inflicted Jimena’s fatal wounds. Counsel also argued that there was insufficient evidence to prove that Jimena had been sexually abused. The jury disagreed. It found Merentes guilty of second degree murder, assault on a child with force likely to produce great bodily injury resulting in death, and two counts of committing a lewd act on a child. In a separate proceeding, Correal pleaded guilty to one count of felony child abuse.

I

Merentes contends the circumstances surrounding his interrogation were so coercive that his admissions should have been suppressed as being involuntarily rendered. We disagree and uphold the trial court’s decision to allow Merentes’ admissions into evidence.

After Jimena was taken to the hospital, Merentes was interviewed by two homicide detectives. At the outset of the interview, they assured Merentes he was not under arrest. However, they did not tell him Jimena was dead. Merentes was not entirely forthcoming either. He told the detectives his name was Eduardo Ramirez Colmenares and that he and Correal were just friends. He also said he had spent the last 10 months in Northern California before returning to town the previous day. Merentes had been out of town until the previous day, but he had not been gone for as long as he claimed.

When the questioning came around to Jimena's stomach injuries, Merentes said she fell out of bed the previous night and landed on a vase. He denied hurting her or even knowing about her bruises. He also denied ever having seen her naked. The detectives were dubious. To bring home the gravity of the situation, they informed Merentes that Jimena had actually died from her injuries. This disclosure brought Merentes to tears. He told the officers he felt ill and wanted to speak with Correal, who was being interviewed in another room. However, the officers continued the interview.

They told Merentes that Jimena's body was covered with bruises and that it appeared as though they had been inflicted by someone's fist. They then suggested Jimena's assailant may have acted out of anger and not intended to hurt her. They also speculated the assailant may have been one of the four adults who lived with Jimena. Merentes said he didn't think Correal or Amezcua killed Jimena, and he didn't know whether Amezcua's boyfriend did. The detectives implied that did not bode well for Merentes. However, they told him he had nothing to be ashamed of because "sometimes our anger just gets out of hand. . . . [¶] . . . [¶] At times people loose [*sic*] control and they get angry — they are tired, they are angry about other things and the last thing one wants to hear is a screaming child."

At that point, Merentes admitted that he "hit" Jimena. However, he offered a blameless account as to how this occurred. He said that Jimena accidentally fell into his knees while they were playing the previous afternoon and that she did not seem to be seriously hurt. In fact, he claimed he didn't notice anything wrong with her until the next morning, when Correal showed him some bruises on her stomach. Although the detectives were skeptical of this, Merentes insisted he loved Jimena and would never have hurt her on purpose. He also repeated his request to speak with Correal. The officers told him he could do so when Correal was done being interviewed. They then took a break, during which Merentes was offered beverages and allowed to use the restroom.

When questioning resumed, Merentes told the detectives his real name. They told him he was no longer free to leave and read him his *Miranda* rights,¹ which Merentes said he understood. Asked if he wanted to keep talking, Merentes answered, “I don’t know, truthfully.” He then told the officers, “I would like to speak out and your company does me good.” He also said he was afraid and did not want to go to jail. When the officers asked him if he wanted to be alone, he said no. He then mentioned Correal and his mother and said, “I want to speak out with someone. I feel really bad.” After that, he said, “I know that — I am guilty but” The detectives then again asked him if he would be willing to continue the interview. This time Merentes said yes.

The detectives took this opportunity to continue to probe the cause of Jimena’s fatal injuries. When Merentes continued to deny any wrongdoing, they told him it was important for him to tell the truth. Merentes insisted he was being honest and had divulged everything to them. But suspecting otherwise, the detectives urged Merentes “to go just a little bit further” in terms of telling them what happened. They then asked Merentes point blank whether he hit Jimena with his fists, and he said no.

The detectives told Merentes the medical evidence would prove that Jimena’s injuries were intentionally inflicted, but he stuck to his story that he did not hit Jimena on purpose. Yet when the detectives said Jimena’s injuries could not have been caused by falling into his knees, Merentes said, “I know that.” He then asked the officers, “What do you want me to tell to you, that all right I did do it?” They said, “If it’s the truth,” and Merentes said it was not.

The detectives then changed tactics and told Merentes they already knew what had happened and were only interested in knowing why it happened. They assured him that he would feel better if he came clean and that they would understand his explanation. They also told him he was “running out of time” because once the interview

¹ See *Miranda v. Arizona* (1966) 384 U.S. 436.

ended, he wouldn't have another chance to tell them his side of the story. Merentes then modified his story and said Jimena fell against his hand several times while they were playing. He said that one time he closed his hand to protect his fingers and that his fist may have hurt her stomach.

The detectives were not persuaded. They told Merentes they did not believe him and repeatedly accused him of hitting Jimena on purpose. One of the detectives put it to Merentes this way, "You hit her. And no — I am not asking you if you hit her, I know that you hit [her]." With that, Merentes admitted, "Ok. I hit her." At first he said he did not know why he did it. Then he explained he hit Jimena because she put her finger inside Sabrina's mouth, causing her to spit up. Merentes said this made him so angry he punched Jimena in the stomach not once, but twice. While he admitted she buckled over from the blows, Merentes claimed she seemed to be all right afterwards, although she did throw up later that night.

Merentes told the detectives that Jimena vomited several more times the next morning. Then, after they took Correal to work, she complained of dizziness and threw up in the back seat. That prompted him to pull over and seek help. He insisted to the officers that he did not intend to kill Jimena and that Correal had nothing to do with her death. At that juncture, the detectives ended the interview and allowed Merentes to speak with Correal.

Before trial, Merentes moved to suppress his statements as being involuntarily rendered. Specifically, he argued that both his admissions and his *Miranda* waiver were "obtained in an oppressive and coercive manner." The trial judge ruled, "The issue is whether [Merentes'] free will [was] overborne. You look at the length of the interrogation. Granted, it was three and a half hours. But I don't think based on the circumstances or the gravity of the offense here that that's excessive. [¶] . . . I don't think there were any deceptions here Case law allows certain aggressive interrogation techniques as long as they are not unlawful. [¶] I think the officers here repeatedly

indicated that they only wanted the truth. The conversation was for the most part subdued. [¶] I think looking at the totality of the circumstances, there were no threats or promises or guarantees of leniency. Really no deception or coercion that I would believe would come even close to the standard that would make this interview involuntary.”

Regarding Merentes’ *Miranda* waiver, the court found his statements about his willingness to continue the interview were ambiguous and therefore the officers were entitled to seek clarification as to his intent. The court did not believe Merentes’ waiver was involuntarily obtained. It therefore denied his motion to suppress.

In reviewing this decision, ““we accept the trial court’s resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. We independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained. [Citations.]’ [Citation.]” (*People v. Storm* (2002) 28 Cal.4th 1007, 1022-1023.)

As the trial court rightly observed, “The test for determining whether a confession is voluntary is whether the defendant’s ‘will was overborne at the time he confessed.’ [Citation.] ““The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were ‘such as to overbear [defendant’s] will to resist and bring about confessions not freely self-determined.’ [Citation.]” [Citation.] In determining whether or not an accused’s will was overborne, “an examination must be made of ‘all the surrounding circumstances — both the characteristics of the accused and the details of the interrogation.’ [Citation.]” [Citation.]’ [Citation.]” (*People v. Maury* (2003) 30 Cal.4th 342, 404.)

We must also remember that police interrogation will necessarily ““involve some pressure because its purpose is to elicit a confession.’ [Citation.] ‘[T]he fact that the tactics produced the intended result . . . does not make [a] confession involuntary.’

[Citation.] In other words, ‘there is nothing inherently wrong with efforts to create a favorable climate for confession.’ [Citation.]” (*United States v. Santos-Garcia* (8th Cir. 2002) 313 F.3d 1073, 1079.)

Nonetheless, Merentes argues the detectives went too far in terms of getting him to confess. The way he sees it, “The entire tenor of the interrogation made it clear [the detectives] were not going to let him either out of the interview or speak unless he said exactly what [they] wanted.” But that simply is not true. At the start of the interview, the detectives specifically told Merentes that he was not under arrest. It was only after he admitted hitting Jimena that they told him he was no longer free to leave. Even then, the officers made sure that Merentes understood his *Miranda* rights and wanted to continue the interview. That Merentes told the officers “your company does me good” and said he “want[ed] to speak out” belies his assertion they “relentlessly pressured [him] to tell them what they wanted to hear.” The record simply does not support Merentes’ claim that he was coerced into giving up his right to remain silent or precluded from exercising his free will during the course of the interview.

The detectives did make some direct accusations during the interview. But they also made it clear to Merentes that they were only interested in finding out what really happened to Jimena. Thus, when Merentes asked them if they would like it if he just confessed and admitted the whole thing, they told him that would satisfy them only “if it’s the truth.” And when Merentes said it was not, they permitted him ample opportunity to explain himself. The fact they expressed disbelief about some of Merentes’ explanations and confronted him with incriminating information does not render his ensuing statements involuntary. (See *United States v. Santos-Garcia, supra*, 313 F.3d at p. 1079; *United States v. Wolf* (9th Cir. 1987) 813 F.2d 970, 975.) The interrogation may have been tough, but it was also fair. No threatening or unduly coercive tactics were employed.

Merentes makes much of the fact he was just 20 years old at the time of the interview and had no prior record, suggesting this made him particularly vulnerable to the detectives' interrogation techniques. He also notes that one of the detectives, who is rather large, stood close to him at various times during the interview. But this is grasping at straws. Despite all this, Merentes held up rather well during the questioning. He did get emotional when told of Jimena's death, and he did express exasperation when the officers refused to accept his various explanations as to why the child died, but overall Merentes held his own throughout the interview. He bobbed and weaved the best he could, but in the end he decided to come clean and confess to hitting Jimena out of anger.

These circumstances are far different than those presented in *People v. Neal* (2003) 31 Cal.4th 63, upon which Merentes relies. In *Neal*, the police intentionally violated the defendant's *Miranda* rights during questioning and held him overnight before he confessed to a murder they were investigating. There were other factors at play in *Neal* as well, including "defendant's youth, inexperience, minimal education, and low intelligence; the deprivation and isolation imposed on defendant during his confinement; and a promise and a threat made by the [interrogating] officer" (*Id.* at p. 68.) Combined, these circumstances led our Supreme Court to find that the defendant's confessions were involuntary under the Fourteenth Amendment.

Other than youth and inexperience, none of the pertinent factors in *Neal* were present in this case. The detectives who interviewed Merentes just did not engage in the same heavy-handed tactics condemned in *Neal*. Having considered the totality of the circumstances surrounding Merentes' confession, we are convinced it was the product of his free will and did not come about from oppressive or coercive interviewing techniques. Accordingly, we find the confession was voluntarily rendered and properly admitted into evidence.

II

Next, Merentes argues the court erred in excluding the conversation he had with Correal following his interview with the detectives. The court acknowledged the conversation may have had some probative value to the extent it reflected on Merentes' credibility. However, relying on Evidence Code section 352, the court excluded the conversation for fear it would confuse the issues, mislead the jury and consume an inordinate amount of time.

Merentes claims the court's failure to review the audiotape of the conversation, or at least read a transcript of the conversation, demonstrates the court abused its discretion under section 352. However, nothing in that section requires the trial court to pore over every word of a proffered conversation before ruling on its admissibility. In fact, predicated evidentiary rulings based on a party's offer of proof is a well-accepted judicial practice. Here, the trial court not only entertained Merentes' offer regarding the relevancy of the proffered conversation, it also engaged in the requisite balancing process contemplated by section 352. Nothing more was required.

Having said that, we are somewhat skeptical of the court's rationale for excluding the conversation. The court cited the potential for confusion and delay, but the conversation lasted only about 15 minutes, and there is nothing particularly confusing about what was said. No doubt, Merentes and Correal were emotionally distraught at the time. However, their thoughts, as expressed during the conversation and set out below, were quite lucid. Given that the court allowed the prosecution to introduce a three-hour videotape of Merentes being questioned, we fail to see how a few more minutes' worth of evidence would have materially affected the course of the trial. After all, Merentes and Correal discussed the very subject matter of the police interview, i.e., the cause of Jimena's death. And because the police did not tell them their conversation was being recorded, the risk of fabrication was negligible. All things considered, it is unlikely their conversation would have confused or misled the jury or caused undue delay in the trial.

However, even assuming the court abused its discretion in excluding the conversation, we are convinced this decision was patently harmless. At the outset of the conversation, Merentes admitted to Correal that he had done “wrong.” He said, “I hit [Jimena] twice yesterday in the stomach. . . . She was putting her finger in [Sabrina’s] mouth . . . and she made me mad.” When Correal asked Merentes why he didn’t tell her about this, he said, “I didn’t see it convenient.” He then told Correal he felt really bad and asked for her forgiveness. After that, he informed Correal he was under arrest for Jimena’s death. He said, “They’re accusing me of that. I’m telling them that it wasn’t my fault. They don’t believe me. It’s because I hit her twice in the stomach, but that was all my love.”

Correal did not believe Merentes was at fault. In her mind, he could not have caused Jimena’s stomach injuries because he just got back in town the previous day and “you can’t get bruises in half a day.” She said Jimena “had those bruises already. The boys did those bruises. She told me.” Later in the conversation, Merentes said Jimena could have gotten injured while they were playing together. However, Correal told Merentes that was not possible because “she had those [bruises] since the day you left.” Merentes then said he had informed the detectives that he had punched Jimena twice. Correal replied, “No they weren’t punches, it’s because they interpret, that’s why you have to say the things how they are.” However, Merentes admitted, “They were asking me for the truth love. I told them the truth. I feel bad.”

The foregoing makes it clear that Correal was in denial about what happened to Jimena. In fact, at several points during the conversation she expressed disbelief that Jimena was actually dead. She also refused to believe that Merentes — her own boyfriend — could have killed her daughter. However, nothing she said would have been particularly helpful to Merentes at his trial. Although she didn’t think Jimena’s bruises would have been evident if Merentes had punched her in the stomach the previous day, this assumption flies in the face of common knowledge. Her claim that “the boys”

inflicted Jimena's fatal wounds and that they were evident before Merentes left town would only have undermined her credibility. The fact is, Merentes left town several months before Jimena died. Bruises do not last that long, and the evidence revealed that Jimena's stomach wounds were inflicted within just hours or days of her death. And Correal's insistence that Merentes did not punch Jimena would have further damaged any credibility she might otherwise have had, given the fact she had no personal knowledge of this.

Throughout the conversation, Correal simply presents herself as someone who was trying to protect and coach Merentes regardless of his involvement. And, of course, in the end, Merentes admitted he told the detectives the truth, i.e., that he punched Jimena because he was angry. Nothing Correal said during the conversation could have blunted that admission.

Merentes did say some things that were consistent with his statements to the detectives and the jury. For instance, he told Correal the same basic story as to how Jimena got sick in his car before she died, and he also insisted he did not intend to kill Jimena. But we do not believe the outcome of the trial would have been any different had the jury heard these statements. While they corroborated Merentes' version of events in some regard, they did not go to the core issue of whether Merentes actually punched Jimena. Because Merentes admitted to Correal that he did, any error in excluding his statements was certainly harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

III

Merentes also asserts the court erroneously excluded evidence that Correal had a history of substance abuse and a history of violence toward both Jimena and her father Orozco. Merentes claims this evidence was admissible to prove Correal was responsible for Jimena's fatal injuries. We disagree.

"[T]o be admissible, evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt, must

link the third person either directly or circumstantially to the actual perpetration of the crime.” (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325.) It is not enough for the defendant, as Merentes has done here, merely to offer evidence of past violence or drug use by the third party, even if that violence was directed toward the victim. In fact, attempting to establish third-party culpability in this fashion runs afoul of Evidence Code section 1101, which prohibits the introduction of prior bad acts to show a person’s propensity for criminality. (See *People v. Davis* (1995) 10 Cal.4th 463, 501 [evidence of third party’s sexual history and drug use inadmissible to identify him as perpetrator]; *People v. Farmer* (1989) 47 Cal.3d 888, 921 [evidence of third party’s criminal history inadmissible to identify him as perpetrator]; *People v. Adams* (2004) 115 Cal.App.4th 243 [same].) Because Merentes has failed to establish any connection between Correal’s prior violence and drug use and Jimena’s fatal injuries, the trial court properly excluded evidence pertaining to Correal’s past misdeeds.

IV

Although the trial court instructed the jury that involuntary manslaughter was a lesser included offense of murder, Merentes faults the court for not adequately explaining the difference between these offenses. Specifically, he complains the court failed to inform the jury per CALJIC No. 8.51 that second degree implied malice murder involves conscious indifference to the risks created by the one’s actions, i.e., subjective awareness, whereas involuntary manslaughter involves gross negligence, which is measured under an objective standard.

Even though the court did not give CALJIC No. 8.51, it did cover the substance of that instruction. It told the jury that with second degree murder the act must be “deliberately performed with knowledge of the danger to and with conscious disregard for human life,” while involuntary manslaughter encompasses an unlawful killing committed “without conscious disregard for human life.” The prosecutor also emphasized this distinction in closing argument by reminding the jury that second degree

murder requires an act done in “[c]onscious disregard for human life. That means the person is aware that their act is dangerous to human life, so it’s a subjective awareness.” Under these circumstances, the jury could not have been misled as to the mental state required for second degree murder. (See *People v. McPeters* (1992) 2 Cal.4th 1148, 1191 [arguments of counsel may be considered in evaluating likelihood the jury understood its charge in a manner that violated the defendant’s rights].)

Merentes also faults the court for failing to instruct on what he believes was the most “appropriate theory” of involuntary manslaughter, i.e., “a killing in the commission of willful harm or injury to a child under Penal Code section 273a, subdivision (b),” the misdemeanor child abuse law. However, according to Merentes’ testimony, he did not injure or endanger Jimena at all; rather he just pulled her away from Sabrina and removed her from the room. As the trial court instructed, this testimony, if believed, arguably could have supported a finding of involuntary manslaughter based on assault. However, it could not have supported a finding of involuntary manslaughter based on the offense of misdemeanor child abuse because it failed to prove the willful harm or injury that is required under Penal Code section 273a, subdivision (b).

Of course, in his police interview Merentes did admit to punching Jimena in the stomach twice. But the misdemeanor child abuse law applies only “under circumstances or conditions other than those likely to produce great bodily harm or death.” (Pen. Code, § 273a, subd. (b).) When a grown man punches a small child in the stomach, such consequences are not only likely, they are virtually inevitable. According to his police statement then, Merentes was, at the very least, guilty of felony child abuse for abusing Jimena “under circumstances or conditions likely to produce great bodily harm or death.” (Pen. Code, § 273a, subd. (a).) Therefore, the court was not required to instruct on involuntary manslaughter based on the crime of misdemeanor child abuse. No instructional error occurred.

V

Merentes argues the cumulative effect of the court's errors deprived him of a fair trial, but the only potential error we detected was the court's failure to admit the jailhouse conversation between Merentes and Correal. And, as we have explained, the exclusion of this evidence was patently harmless. We therefore reject Merentes' cumulative error argument.

VI

Lastly, Merentes correctly notes that while this was not a "Three Strikes" case, the abstract of judgment reflects that it was. And, even though the court ordered certain information to be stricken from the probation report, that information is still legible. We agree with Merentes that these errors must be corrected.

DISPOSITION

The clerk of the trial court is ordered to modify the abstract of judgment to delete any reference to this being a Three Strikes case. The clerk is also ordered to redact the information that was ordered stricken from the probation report. As so modified, the judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.